

# **EXHIBIT I**

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7 Bard Peripheral Vascular, Inc.

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 WAYNE RUDEN,  
14 Plaintiff,

15 vs.  
16 C. R. BARD, INC., a New Jersey corporation,  
BARD PERIPHERAL VASCULAR, INC. (a  
subsidiary and/or division of defendant C. R.  
BARD, INC.) an Arizona corporation,  
CALIFORNIA PACIFIC MEDICAL CENTER,  
and DOES 1-100 INCLUSIVE,

17 Defendants.  
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19 Case No.: 4:15-cv-05189-JSW  
20  
21 Honorable Jeffrey S. White  
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**DEFENDANTS C. R. BARD, INC. AND  
BARD PERIPHERAL VASCULAR, INC.'S  
REPLY IN SUPPORT OF MOTION TO  
STAY**

Date: January 8, 2016  
Time: 9:00 a.m.  
Location: Courtroom 5; Second Floor  
Compl. Filed: October 7, 2015  
FAC Filed: December 3, 2015

1 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, “Bard”) hereby  
 2 file this Reply in Further Support of their Motion to Stay<sup>1</sup>:

3 **I. INTRODUCTION**

4 Bard and Defendant California Pacific Medical Center (“CPMC”) agree that the gravamen of  
 5 Plaintiff’s Complaint is products liability, and that CPMC has been improperly joined in the  
 6 litigation by Plaintiff for the purpose of defeating federal jurisdiction. *See* CPMC’s Mot. to Dismiss  
 7 [Dkt. No. 28] at pp.11, 15. This case belongs in the Bard IVC Filter MDL No. 2641, which was  
 8 established by the Judicial Panel on Multidistrict Litigation for the efficient resolution of IVC filter  
 9 cases against Bard. Moreover, Bard agrees that CPMC should not be required to defend itself in the  
 10 MDL. *See* CPMC’s Opp. to Bard’s Mot. to Stay [Dkt. No. 27] at p. 1. That is precisely why Bard  
 11 argued that CPMC has been fraudulently misjoined in this case and that the claims against CPMC  
 12 should be severed and remanded back to state court. *See* Bard’s Notice of Removal [Dkt. No. 1] at  
 13 pp. 6-10.

14 **II. LEGAL ARGUMENT**

15 **A. Plaintiff’s Opposition Is Untimely**

16 Bard filed its Motion to Stay on November 17, 2015. *See* Bard’s Motion to Stay [Dkt. No.  
 17 12]. Oppositions were due on or before December 1, 2015. *See* Docket Text for Dkt. No. 12  
 18 (“Responses due by 12/1/2015.”); *see also* N.D. Cal. L.R. 7.3. Plaintiff’s Opposition to Bard’s  
 19 Motion to Stay is untimely because it was filed on December 4, 2015, three days after it was due.  
 20 *See* Pl.’s Opp. [Dkt. No. 33]. Contrary to Plaintiff’s argument, Bard did not file an “amended Motion  
 21 to Stay.” *See id.* at p. 3. Instead, in accordance with the Court’s November 19, 2015 Order (*see* Dkt.  
 22 No. 16), Bard renoted its Motion to Stay by filing an Amended Notice of Motion on November 20,  
 23 2015. *See* Bard’s Amended Notice of Motion to Stay [Dkt. No. 19]. While the hearing date on  
 24 Bard’s Motion to Stay was reset from January 14, 2016 at 1:30 p.m., *see* Docket Text for Dkt. No.  
 25 12, to January 8, 2016 at 9:00 a.m., *see* Docket Text for November 24, 2015 untitled docket entry,  
 26 the briefing deadlines were not reset.

27 <sup>1</sup> Bard files this Reply in response to Plaintiff’s untimely Opposition to Bard’s Motion to Stay [Dkt.  
 28 No. 33], and to Defendant California Pacific Medical Center’s Response in Opposition to Bard’s  
 Motion to Stay [Dkt. No. 27].

1           **B. Plaintiff's And CPMC's Oppositions Apply The Wrong Standard To Determine**  
 2           **Whether A Stay Is Appropriate**

3           Plaintiff's and CPMC's Oppositions are based on a fundamentally flawed assumption  
 4 regarding the legal standard by which federal courts in the Northern District of California assess a  
 5 motion to stay where a motion to remand is also pending. Relying on a three-step approach from  
 6 *Conroy v. Fresh Del Monte Produce, Inc.*, 325 F. Supp. 2d 1049 (N.D. Cal. 2004), Plaintiff argues  
 7 that this Court must first address the merits of a motion to remand before determining whether to  
 8 stay proceedings. *See* Pl.'s Opp. [Dkt. No. 33] at p. 4.<sup>2</sup> But Plaintiff fails to point out that the court in  
 9 *Conroy* unambiguously stated that “[t]he Ninth Circuit has not expressly adopted this approach.”  
 10 *Conroy*, 325 F. Supp. 2d at 1053. Thus, the approach from *Conroy* is not binding on this Court.  
 11 Indeed, numerous subsequent opinions from the Northern District of California have explicitly  
 12 rejected the approach from *Conroy* or otherwise declined to address the merits of a motion to remand  
 13 before ruling on a motion to stay. *See, e.g., Fortune v. McKesson Corp.*, No. C 13-03172 JSW, 2013  
 14 WL 4104121, at \*2 (N.D. Cal. Aug. 12, 2013) (granting motion to stay pending transfer to MDL,  
 15 notwithstanding pending motion to remand); *Aud v. McKesson Corp.*, No. C 13-03111 JSW, 2013  
 16 WL 3944436, at \*2 (N.D. Cal. July 29, 2013) (granting motion to stay pending transfer to MDL,  
 17 notwithstanding pending motion to remand); *see also, e.g., Guinn v. Bristol-Myers Squibb Co.*, No.  
 18 C 13-01487 WHA, 2013 WL 1964937, at \*1 (N.D. Cal. May 10, 2013) (“In fact, following *Conroy*,  
 19 other courts in the Northern District . . . have made clear that courts are not bound to preliminarily  
 20 consider the merits of a remand motion before considering a motion to stay.” (internal quotation  
 21 marks and citation omitted)); *Jones v. Bristol-Myers Squibb Co.*, No. C 13-2415 PJH, 2013 WL  
 22 3388659, at \*4 (N.D. Cal. July 8, 2013) (rejecting the three-step approach from *Conroy* and instead  
 23 granting the defendant's motion to stay before addressing the merits of the plaintiff's motion to  
 24 remand); *Scroggins v. Hoffman-La Roche, Inc.*, No. C 12-2615 SI, 2012 WL 2906574, at \*2 (N.D.  
 25 Cal. July 16, 2012) (granting motion to stay pending transfer to MDL, notwithstanding pending  
 26 motion to remand); *Freitas v. McKesson Corp.*, No. C 11-05967 JW, 2012 WL 161211, at \*2 (N.D.

27           <sup>2</sup> Without citing *Conroy* or any other authority, CPMC makes the same flawed assumption as  
 28 Plaintiff that the Court needs to address whether it has jurisdiction before it can exercise its power to  
 stay the case or sever certain claims. *See* CPMC's Opp. [Dkt. No. 27] at p. 1.

1 Cal. Jan. 10, 2012) (“[T]he Court finds that Plaintiffs’ reliance on *Conroy* is misplaced. First, the  
 2 court in *Conroy* made clear that the ‘Ninth Circuit has not expressly adopted’ the approach followed  
 3 by the court in that case. Second, following *Conroy*, other courts in the Northern District, including  
 4 this one, have made clear that courts are *not* bound to preliminarily consider the merits of a remand  
 5 motion before considering a motion to stay.” (internal citation omitted)); *Nichols v. DePuy*  
 6 *Orthopaedics, Inc.*, No. C 11-04748 JW, 2011 WL 5335619, at \*2 (N.D. Cal. Nov. 2, 2011) (“[T]he  
 7 Court finds that Plaintiffs’ reliance on *Conroy* is misplaced. First, the court in *Conroy* made clear  
 8 that the ‘Ninth Circuit has not expressly adopted’ the approach followed by the court in that case.  
 9 Second, following *Conroy*, other courts in the Northern District have made clear that the court is not  
 10 bound to ‘preliminarily consider the merits of [a] remand motion before even considering a stay.’”  
 11 (internal citation omitted)); *Hardin v. Merck & Co.*, No. C 07 0070 SBA, 2007 WL 1056790, at \*3  
 12 (N.D. Cal. Apr. 5, 2007) (granting motion to stay pending transfer to MDL, notwithstanding pending  
 13 motion to remand).

14 In accordance with the numerous other decisions in the Northern District of California, this  
 15 Court should reject the rigid, three-step approach from *Conroy* in favor of a more pragmatic test that  
 16 focuses on whether a stay furthers the goals of judicial economy without prejudicing the non-moving  
 17 party. *See, e.g., Fortune*, No. C 13-03172 JSW, 2013 WL 4104121, at \*2 (“In the context of a  
 18 motion to stay pending a motion to consolidate cases before the JPML, district courts should  
 19 consider the following factors: (1) potential prejudice to the nonmoving party; (2) hardship and  
 20 inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be  
 21 saved by avoiding duplicative litigation if the cases are in fact consolidated.”).

### 22           **C. Granting A Stay Will Promote Judicial Efficiency**

23 Plaintiff argues that a court should deny a motion to stay when a motion to remand is  
 24 pending if “the jurisdictional issue has not yet arisen before the MDL.” Pl.’s Opp. [Dkt. No. 33] at p.  
 25 5. The Court should reject Plaintiff’s inflexible rule for two reasons. First, under Plaintiff’s rule, no  
 26 court would ever grant a motion to stay. The first court to face the issue would deny a stay because  
 27 the MDL court has not had a chance to rule on the issue. Every subsequent district court, following  
 28 this rule, would reach the same result for the same reason. The result would be that Plaintiff’s rule

1 would foreclose the possibility of an MDL court addressing jurisdictional issues altogether, at the  
 2 same time foreclosing the judicial efficiencies that come with a central court deciding issues that are  
 3 repeating.

4 Second, although the issue of fraudulent misjoinder is not presently before the Bard IVC  
 5 Filter MDL court, the issue is one that is likely to recur. Joining a local or non-diverse defendant,  
 6 such as a local healthcare provider or sales distributor, is common in medical device and  
 7 pharmaceutical litigation, and it is often done for the purpose of frustrating federal jurisdiction, as it  
 8 was here. The issue therefore will arise again in other IVC filter cases. Indeed, in another Bard IVC  
 9 Filter matter, Bard removed the case to the District of Delaware on the basis of fraudulent  
 10 misjoinder. *See Fraser-Johnson v. C. R. Bard, Inc.*, Case No. 1:15-cv-00968-UNA [Dkt. No. 1] (D.  
 11 Del. Oct. 23, 2015). The plaintiff has moved to remand the case, *see id.* [Dkt. No. 10], and to vacate  
 12 the JPML's Conditional Transfer Order. *See Fraser-Johnson v. C. R. Bard, Inc.*, MDL No. 2641,  
 13 DE/1:15-cv-00968 [Dkt. No. 10] (J.P.M.L. Nov. 18, 2015). Because the JPML will likely finalize  
 14 transfer of the *Fraser-Johnson* matter to the Bard IVC Filter MDL,<sup>3</sup> the issue of fraudulent  
 15 misjoinder is one that is *likely* to be addressed by the MDL.

16 The Bard IVC Filter MDL is relatively new, having been created by the JPML on August 17,  
 17 2015. Therefore, it should not be surprising that to date only a few plaintiffs have attempted to  
 18 circumvent the efficiencies of the MDL by fraudulently misjoining non-diverse defendants. That the  
 19 Bard IVC Filter MDL is at its infancy should not foreclose a stay of this action. The issue of  
 20 fraudulent misjoinder will inevitably arise again in the Bard IVC Filter litigation, either in this  
 21 District or in another Federal District Court, where a plaintiff seeks to avoid the MDL by artificially  
 22 destroying diversity. Where, as here, a jurisdictional issue will likely arise in other cases transferred  
 23 to an MDL, granting a defendant's request for a stay so that the MDL court can uniformly resolve

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24  
 25     <sup>3</sup> The JPML routinely finalizes Conditional Transfer Orders even if they are opposed on  
 26 jurisdictional grounds. *See* Bard's Motion to Stay [Dkt. No. 12] at p. 3; *see also, e.g., In re: Lipitor*  
 27 (*Atorvastatin Calcium*) *Mkt., Sales Pracs. and Prods. Liab. Litig.*, MDL No. 2502, 2015 WL  
 28 7769022, at \*2 (J.P.M.L. June 8, 2015) (transferring cases for consolidation despite pending  
 objections to federal jurisdiction); *In re: Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354  
 (J.P.M.L. 2005) ("[The] pendency of a motion to remand to state court is not a sufficient basis to  
 avoid inclusion in Section 1407 proceedings. We note that motions to remand . . . can be presented  
 to and decided by the transferee judge.").

1 the issue best serves the interests of judicial economy. *See Addison v. Bristol-Myers Squibb Co.*, No.  
 2 C 13-02166 WHA, 2013 WL 3187859, at \*1 (N.D. Cal. June 21, 2013) (granting motion to stay,  
 3 where jurisdictional issue “will likely be raised in every other action”); *Nichols v. DePuy  
 4 Orthopaedics, Inc.*, No. C 11-04748 JW, 2011 WL 5335619, at \*2 (N.D. Cal. Nov. 2, 2011)  
 5 (granting motion to stay, where jurisdictional issue would likely arise in other, similar actions).

6 **D. CPMC Will Not Be Prejudiced by a Stay; Instead, Its Interests Are Aligned With  
 Bard’s Interests**

7  
 8 The only prejudice that CPMC alleges it will suffer in the event of a stay (and the resulting  
 9 transfer of this case to the MDL) is that it will be required to “defend[] itself in a foreign  
 10 jurisdiction,” i.e., the MDL in Arizona. CPMC’s Opp. to Bard’s Mot. to Stay [Dkt. No. 27] at p. 1.  
 11 Bard agrees with CPMC that CPMC should not be required to litigate the merits of Plaintiff’s claims  
 12 against it in the MDL in Arizona. Granting Bard’s Motion to Stay achieves this result.

13 Bard’s position in this case is that CPMC—a fraudulently misjoined party—should be  
 14 severed and remanded to state court. *See* Bard’s Notice of Removal [Dkt. No. 1] at pp. 6-8; *Sutton v.  
 15 Davol, Inc.*, 251 F.R.D. 500, 505 (E.D. Cal. 2008) (severing and remanding fraudulently misjoined  
 16 medical malpractice claims against health care providers in product liability action against medical  
 17 device manufacturer). In the alternative, Plaintiff’s claims against CPMC should be severed and  
 18 remanded pursuant to Rule 21 because CPMC is not a necessary and indispensable party. *See* Bard’s  
 19 Notice of Removal [Dkt. No. 1] at pp. 8-10. CPMC argues in its Motion to Dismiss that Plaintiff has  
 20 failed to state a claim against it. *See* CPMC’s Mot. to Dismiss [Dkt. No. 28] at pp. 5-11. Staying this  
 21 case allows the MDL court to consider all of these positions. If the MDL court agrees that CPMC is  
 22 a fraudulently misjoined party or is not a necessary and indispensable party, the MDL court will  
 23 sever and remand the medical malpractice case to state court, where it belongs, and retain the  
 24 products liability case in the MDL, where it belongs. Alternatively, if the MDL court grants CPMC’s  
 25 Motion to Dismiss, CPMC will be dismissed from the case altogether. If the MDL court disagrees  
 26 with Bard’s jurisdictional argument and denies CPMC’s Motion to Dismiss, the entire action will be  
 27 remanded to state court. Under all of the possible scenarios, CPMC will not be required to litigate  
 28 the merits of Plaintiff’s claims against it in the MDL in Arizona. Therefore, Bard and CPMC’s  
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1 positions are aligned insofar as both parties believe that the federal court action against CPMC  
 2 should be terminated.

3 **E. Plaintiff Will Not Be Prejudiced By A Stay, Whereas Bard Will Prejudiced Without A  
 4 Stay**

5 Plaintiff's arguments that he will be prejudiced by a stay are unavailing. His assertion that he  
 6 will be prejudiced by having to litigate against competing "empty chair" defenses is speculative, at  
 7 best, and he cites no authority for his position. Additionally, while Plaintiff argues that he will be  
 8 prejudiced by having to litigate on two fronts (both state and federal court), that is simply the result  
 9 of Plaintiff trying to fraudulently misjoin two, legally and factually distinct claims. Furthermore,  
 10 Plaintiff's concern about having to litigate his case in a "foreign federal court hundreds of miles  
 11 from his home" overstates the inconvenience, if any, of litigating in another district and disregards  
 12 Bard's right to removal and transfer to the MDL, where judicial economy is best served. *See Sutton*  
 13 *v. Davol, Inc.*, 251 F.R.D. 500, 505 (E.D. Cal. 2008) (recognizing the defendants' "right to removal  
 14 in the remaining multidistrict action," which "preserve[s] the interests of judicial expediency and  
 15 justice").<sup>4</sup> Finally, Plaintiff's assertion that a stay somehow unnecessarily delays his action has been  
 16 rejected by other courts addressing similar arguments by plaintiffs. *See, e.g., Little v. Pfizer, Inc.*,  
 17 No. C-14-1177 EMC, 2014 WL 1569425, at \*3 (N.D. Cal. Apr. 18, 2014) (granting a motion to stay,  
 18 with a resulting delay on a decision on a motion to remand, "does not constitute prejudice sufficient  
 19 to outweigh the efficiency gains of staying this action"); *Walker v. Merck & Co.*, No. 05-CV-360-  
 20 DRH, 2005 WL 1565839, at \*2 (S.D. Ill. June 22, 2005) ("[T]he Court finds that while Plaintiffs  
 21 might well be subjected to some delay as a result of the issuance of a stay, that prejudice does not  
 22 outweigh the judicial economy interests.").

23 <sup>4</sup> Plaintiff's concern also disregards the fact that Congress has enacted the MDL legislation that  
 24 allows a single MDL court to exercise nationwide personal jurisdiction without regard to traditional  
 25 concerns of *in personam* jurisdiction and venue. *See In re Agent Orange Prod. Liab. Litig.*, MDL  
 26 No. 381, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause,  
 27 enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. . . . One  
 28 such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute.") (internal  
 citation omitted); *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L.1976)  
 ("Transfers under Section 1407 are simply not encumbered by considerations of *in personam*  
 jurisdiction and venue . . . Following a transfer, the transferee judge has all the jurisdiction and  
 powers over pretrial proceedings in the actions transferred to him that the transferor judge would  
 have had in the absence of transfer.").

1 On the other hand, without a stay, Bard will suffer the prejudice of potentially inconsistent  
 2 rulings by different federal courts addressing the same jurisdictional issue, as well as other issues.  
 3 Additionally, without a stay, before this case is transferred to the MDL, Bard will be required to  
 4 litigate this action in parallel proceedings in multiple courts without the full benefit of the highly  
 5 organized process of the MDL proceedings. This creates the risk that Bard could be forced to litigate  
 6 the same issues in this case before this Court and the MDL court. For example, if this Court denies  
 7 Bard's Motion to Stay and then also denies Plaintiff's Motion to Remand and the case is transferred  
 8 to the MDL, Judge Campbell could revisit the jurisdictional issue, forcing Bard to litigate it twice.  
 9 See *Jones v. Bristol-Myers Squibb Co.*, No. C 13-2415 PJH, 2013 WL 3388659, at \*3 (N.D. Cal.  
 10 Jul. 8, 2013) (describing this and other prejudice that could befall a defendant if a court denies a  
 11 motion to stay when a motion to remand is also pending). Thus, while Plaintiff will not be  
 12 prejudiced by a stay, Bard will suffer prejudice.

#### 13 **F. Plaintiff Has Fraudulently Misjoined CPMC**

14 As demonstrated in Bard's Notice of Removal, Plaintiff has fraudulently misjoined CPMC,  
 15 and Bard properly removed this case to federal court. See Bard's Notice of Removal [Dkt. No. 1] at  
 16 pp. 6-8. Where a defendant is fraudulently misjoined, its presence will not defeat diversity. See  
 17 *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996) (holding diversity of citizenship  
 18 requirement was satisfied by reason of fraudulent joinder doctrine because the alleged  
 19 transactions involving the non-diverse defendants were wholly distinct from the alleged transactions  
 20 involving the diverse defendants), abrogated on other grounds in *Cohen v. Office Depot, Inc.*, 204  
 21 F.3d 1069 (11th Cir. 2000); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684-85 (D. Nev. 2004) (“[T]his  
 22 Court agrees with the Fifth and Eleventh Circuits that the [*Tapscott*] rule is a logical extension of the  
 23 established precedent that a plaintiff may not fraudulently join a defendant in order to defeat  
 24 diversity jurisdiction in federal court.”) (internal citations omitted); see also *Sutton*, 251 F.R.D. at  
 25 505 (applying the doctrine of fraudulent joinder and holding that the plaintiff's joinder of a non-  
 26 diverse, medical malpractice defendant in a product liability case was “improper”).

27 Other courts have held that claims against a health care provider for medical malpractice are  
 28 not properly joined with a product liability action against a manufacturer if they do not arise out of  
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1 the same transaction or occurrence and, instead, are legally and factually distinct from one another.  
 2 See, e.g., *In re Guidant Corp., Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708,  
 3 Case No. 07-1129, 2007 WL 5377783, at \*7 (D. Minn. June 4, 2007) (severing and remanding only  
 4 the claims against defendant hospital because “the basis for the causes of action against [the  
 5 hospital] do not arise from the same transaction and occurrences as those in the causes of action  
 6 against the [medical device manufacturers]”); *Stone v. Zimmer, Inc.*, No. 09-08202-CIV, 2009 WL  
 7 1809990, at \*4 (S.D. Fla. June 25, 2009) (“The joinder of the malpractice claim against [the doctor]  
 8 and the [pain management center] with the product liability claim against [the product manufacturer]  
 9 is thus inappropriate because these claims do not both involve common questions of law or fact and  
 10 do not assert joint, several or alternative liability arising out of the same transaction, occurrence or  
 11 series of transactions or occurrences.”) (internal quotation omitted).

12 Like the plaintiff’s claims in *Sutton*, Plaintiff’s claims against CPMC do not arise out of the  
 13 same transaction or occurrence as the products liability claims brought against Bard.<sup>5</sup> The products  
 14 liability claims against Bard are based on the “development, testing, assembling, manufacture,  
 15 packaging, labeling, preparing, distribution, marketing, supplying, and/or selling” of the Bard  
 16 Recovery® Filter. Bard’s Notice of Removal [Dkt. No. 1], Ex. B, Compl. ¶ 1. By contrast, the  
 17 medical malpractice and breach of fiduciary duty claims against CPMC are based on whether CPMC  
 18 owed a duty to Plaintiff six years after it provided its treatment and care for Plaintiff, and whether

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19 <sup>5</sup> Although Plaintiff filed a First Amended Complaint on December 1, 2015 [Dkt. No. 31] in an  
 20 apparent attempt to address the multiple problems in his Original Complaint as pointed out by Bard  
 21 in its Notice of Removal [Dkt. No. 1] and by all defendants’ in their Motions to Dismiss [Dkt. Nos.  
 22 18 and 28], for purposes of determining whether this Court has subject matter jurisdiction, it should  
 23 look at the Original Complaint on file at the time of Bard’s Notice of Removal and disregard  
 24 Plaintiff’s First Amended Complaint. See *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221 EMC, 2008  
 25 WL 2157000, at \*5 (N.D. Cal. May 21, 2008) (refusing to consider the plaintiff’s first amended  
 26 complaint, filed four days after removal in an attempt to defeat diversity jurisdiction, instead  
 27 considering only the plaintiff’s original complaint); *Int’l Ins. Co. v. Red & White Co.*, No. C-93-0659  
 MHP, 1994 WL 706362, at \*2 (N.D. Cal. Dec. 12, 1994) (refusing to consider the allegations in an  
 28 amended complaint when determining whether removal is proper, stating that “the right of removal  
 is determined by reference to the complaint *at the time the removal petition was filed*”) (emphasis in  
 original); *see also Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1426 n.12 (9th Cir. 1989)  
 (noting that because the right of removal is determined by the pleadings as they stand when the  
 petition for removal is filed, the court “will not consider the allegations contained in [an] unfiled  
 Proposed First Amended Complaint”); *Collins v. Liberty Life Assur. Co. of Boston*, No. C07-1214 JF  
 (RS), 2007 WL 1430088, at \*2 (N.D. Cal. May 14, 2007) (“The propriety of removal must be  
 considered based upon the complaint at the time of the removal.”).

1 CPMC breached the duty of care and/or its fiduciary duty to Plaintiff by allegedly failing to inform  
 2 Plaintiff about a publically available FDA Public Health Notification directed to physicians and  
 3 health care providers on August 9, 2010. *See, e.g., id.* at ¶¶ 54-62.

4 Plaintiff's Complaint would require one jury to analyze Bard's state of knowledge at the time  
 5 that the filter at issue was designed, developed, tested, and sold, and to also assess the knowledge of  
 6 and standard of care applicable to a hospital in assessing a notice by the FDA about IVC filters years  
 7 after the filter was developed and sold. Of note, the FDA notice relied on by Plaintiff in its action  
 8 against CPMC does not deal specifically with the Recovery® Filter or even filters manufactured by  
 9 Bard, but instead deals with all IVC filters that had ever been marketed up to that time. Therefore,  
 10 Plaintiff's theory against Bard is specific to the Recovery® Filter, whereas, Plaintiff's theory against  
 11 CPMC would require a jury to assess CPMC's duty to inform all of its patients that ever had an IVC  
 12 filter placed prior to the FDA's notice in 2010. Plaintiff's claims allege divergent theories against  
 13 Bard and CPMC that involve different duties, different time frames, and different products. Thus, the  
 14 claims against CPMC are legally and factually distinct from the claims against Bard, and they are  
 15 fraudulently misjoined.

16 Bard acknowledges that certain federal district court opinions in California have declined to  
 17 apply the doctrine of fraudulent misjoinder. However, Plaintiff's and CPMC's briefs fail to address  
 18 Bard's argument that the legal and factual basis for applying fraudulent misjoinder in this action is  
 19 particularly "compelling" in the context of a pending MDL, where the claims against Bard can be  
 20 handled in the most efficient and consistent manner. *Sutton*, 251 F.R.D. at 504 ("Defendants' legal  
 21 and factual position [advocating for the application of fraudulent misjoinder] is compelling,  
 22 especially in the context of Multidistrict Litigation.").

23 Finally, CPMC argues that fraudulent misjoinder requires "egregious" misjoinder for the  
 24 doctrine to apply. However, while the *Tapscott* opinion uses the term "egregious," it did not  
 25 explicitly state that egregiousness is a prerequisite for a finding of fraudulent misjoinder. Other  
 26 courts applying the doctrine of fraudulent misjoinder have refused to require a finding of  
 27 egregiousness. *See, e.g., Greene*, 344 F. Supp. 2d at 685 (severing and remanding medical  
 28 malpractice claims against a health care provider in a products liability action against a

1 pharmaceutical company, where the plaintiffs' joinder was not "an egregious act or fraud upon the  
 2 Court"); *In re: Rezulin Prods. Liab. Litig.*, 168 F.Supp.2d 136, 147-48 (S.D.N.Y. 2001) (same).  
 3 Refusing to require an element of egregiousness is consistent with the similar doctrine of fraudulent  
 4 joinder, which similarly does not require an act of bad faith or intent to deceive the court. *See Plute v.*  
 5 *Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 n.2 (N.D. Cal. 2001) ("The term  
 6 'fraudulent joinder' is a term of art, used for removal purposes, and does not connote any intent to  
 7 deceive on the part of plaintiff or his counsel.").

8 Severing claims against a fraudulently misjoined defendant even in the absence of egregious  
 9 misjoinder is consistent with the Court's authority under Federal Rules of Civil Procedure, Rule 21,  
 10 to "add or drop a party" or to "sever any claim against a party" "on just terms." Fed. R. Civ. Proc.  
 11 21. Where, as here, a plaintiff's claims against two defendants in a products liability case are legally  
 12 and factually distinct from one another, it is "just" to sever the claims against the non-diverse  
 13 defendant to allow the diverse defendant to exercise its "right to removal in the remaining  
 14 multidistrict action and to preserve the interests of judicial expediency and justice so that all pre-trial  
 15 discovery on the products liability case can be coordinated in a single forum." *Sutton*, 251 F.R.D. at  
 16 505.

### 17 III. CONCLUSION

18 Contrary to Plaintiff's and CPMC's position, jurisdictional challenges are not a bar to the  
 19 issuance of a stay. Instead, granting a stay is necessary in this case to allow a single, MDL court to  
 20 resolve jurisdictional issues that are likely to repeat in this litigation. Granting a stay will not  
 21 prejudice CPMC or Plaintiff, but denying a stay will prejudice Bard. Thus, for the foregoing reasons,  
 22 Bard respectfully requests that this Court grant the Motion and issue a stay pending the JPML's  
 23 decision on transferring this case to MDL No. 2641.

24 DATED: December 8, 2015 REED SMITH LLP

25 By: /s/ Mark A. Sentenac

26 Steven J. Boranian

27 Mark A. Sentenac

28 Attorneys for Defendants C. R. Bard, Inc. and  
 Bard Peripheral Vascular, Inc.